Office-Supreme Court, U.S.
FILED
APR 9 1981

80-1695

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

J. E. PELAEZ DEL CASAL and EASTERN AIR LINES, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred by holding that the duty of fair representation is violated *per se* in any case where a union, which supplies counsel in grievance proceedings to members and to non-member agency fee payors, fails to provide the same service to a non-member who makes no contributions to its cost.*

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* All parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are listed in the caption of the case in this Court. Eastern Airlines, a defendant below, is listed as a respondent pursuant to Rule 19.6.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 634 F.2d 295 and is an Appendix to this Petition (1a, *et seq.*)

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on January 16, 1981. A timely petition for rehearing *en banc* was denied on February 18, 1981 (16a). By Order of March 11, 1981, the Court of Appeals stayed issuance of its mandate to and including April 10, 1981 to allow filing of a petition for writ of certiorari (18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The duty of fair representation arises from a union's exclusive representational status under § 2 Fourth of the Railway Labor Act, 45 U.S.C. 152 Fourth, which provides in pertinent part as follows:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . ."

STATEMENT OF THE CASE

Petitioner Air Line Pilots Association (ALPA) is the exclusive bargaining representative of air line pilots employed by Eastern Airlines, Inc. Respondent Del Casal was employed, through the time of his discharge, by Eastern under a collective bargaining agreement between ALPA and Eastern. That agreement did not include a union security provision and Del Casal was not a dues-paying ALPA member; nor did he pay equivalent agency fees for ALPA's bargaining services.[1] Respondent was discharged May 29, 1975 on the ground that he was an incompetent and unsafe pilot (2a).[2] Del Casal filed a grievance pursuant to the collective bargaining agree-

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[1] Under the Railway Labor Act, union security provisions requiring payment of dues or equivalent agency fees as a condition of continuing employment were specifically sanctioned by the 1951 amendment to § 2 Eleventh, 45 U.S.C. 152 Eleventh, *Railway Emp. Dept.* v. *Hanson*, 351 U.S. 225 (1956).

[2] Twice prior to his discharge, Del Casal had sought to become an ALPA member but was rejected because the member-pilots who had flown with him considered him incompetent as a pilot. Pursuant to an independent and unrelated examination by Eastern management officials of Del Casal's proficiency, Eastern determined that he was not a competent pilot and terminated his employment.

ment. The grievance was rejected at the initial stages after which ALPA—at Del Casal's request—submitted it for a hearing before the Eastern Airlines Pilots Systems Board of Adjustment (System Board).[3]

ALPA furnishes a staff attorney to those airline employees in System Board arbitration proceedings who are dues-paying members and also to those non-members who pay equivalent agency fees for ALPA's services (R. 127, Exh. 28) (references are to the docket entry numbers on the district court's docket sheet). As stated above, Del Casal was not a member of ALPA nor did he pay agency fees. ALPA staff attorney, John Loomos, assisted Del Casal at the initial stages of his grievance; after perfecting Del Casal's appeal to the final step of the grievance procedure, Loomos advised Del Casal that, because of ALPA's policy, he would be unable to represent Del Casal at the System Board hearing. Pursuant to Loomos' advice, Del Casal retained David Block, Esq. who represented him at the System Board hearing (3a).[4]

The Board, after extensive evidentiary proceedings, sustained Del Casal's termination, unanimously concluding that Eastern's decision was based upon just cause (4a). Del Casal thereafter brought suit against Eastern and ALPA seeking as against Eastern to set aside the

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[3] The system board, composed of two members from Eastern and two members from ALPA is an arbitration tribunal established pursuant to the Railway Labor Act, 45 U.S.C. 184, and the collective bargaining agreement between Eastern and ALPA.

[4] The record shows that not only did Loomos aid Del Casal at the initial stages of his grievance, but also that he attempted to appear at the System Board hearings in order to assist, but was excluded by Block (R. 142: Lehman Dep. at 14-20, 23; Cochran Dep. at 10-13). Indeed, the record shows that Loomos provided Block with copies of pertinent documents, including prior Board awards and opinions, did attend the first hearing as an observer, and assisted Block in every way requested (R. 82, Loomos Dep. at p. 75; R. 78, Plaintiff's Answers to ALPA's Interrogatories, ¶¶ 5, 7).

decision of the System Board and from ALPA to recover attorney's fees incurred by him in unsuccessful pursuit of his grievance as a consequence of ALPA's refusal to furnish staff counsel. The district court held that ALPA's refusal to provide Del Casal with staff counsel breached its duty of fair representation and entered judgment of $35,000 against ALPA for Del Casal's attorney's fees. The district court at the same time rejected Del Casal's claim against Eastern holding that the System Board decision was final and binding and that the fairness of the proceeding had not been affected by ALPA's refusal of staff counsel.

The Court of Appeals, concluding that Del Casal's grievance had been properly rejected, affirmed dismissal of Del Casal's claim against Eastern. It observed that Del Casal had been represented by retained counsel throughout the arbitration process and that there was "no claim that a union attorney could have adduced additional evidence in [his] favor." (8a). At the same time, the Court of Appeals affirmed the judgment against ALPA, holding that ALPA had breached its duty of fair representation by refusing Loomos a staff attorney at the System Board hearing. The Court of Appeals concluded as follows:

> "The record shows that ALPA does provide attorneys to grievants at their hearings before the System Board. It is also clear from the record that John Loomos, the ALPA staff attorney, would have represented Del Casal but for the fact that he was not a union member. While ALPA has the authority to decide under what conditions an attorney will be supplied to a grievant, the fact that the grievant is not a member of the union can play no part in that decision." (11a).

Even though it found that Del Casal's underlying grievance was lacking in merit, the Fifth Circuit nevertheless affirmed the $35,000 judgment against ALPA.

REASONS FOR GRANTING THE WRIT

THE FURNISHING OF STAFF COUNSEL FOR ARBITRATION PROCEEDINGS AS AN INCIDENT OF UNION MEMBERSHIP TO INDIVIDUALS WHO PAY MEMBERSHIP DUES OR EQUIVALENT SERVICE CHARGES IS A REASONABLE ALLOCATION OF LIMITED UNION RESOURCES AND DOES NOT VIOLATE THE DUTY OF FAIR REPRESENTATION AS PREVIOUSLY ARTICULATED BY THIS COURT AND OTHER COURTS OF APPEALS.

The Fifth Circuit's decision in this case, holding ALPA's policy for furnishing staff counsel in violation of the duty of fair representation, establishes a *per se* rule that unions which furnish counsel to dues-paying members and to agency fee payors must provide the same service to non-members who pay no part of the cost of the service. Under the Fifth Circuit's rule, a union failing to provide counsel faces liability for fee obligations incurred by the non-member to individually-retained counsel, even if the non-member's underlying grievance against the employer is determined to be without merit. This decision represents an unprecedented expansion of the fair representation duty with substantial implications not only for ALPA but for other unions who provide counsel for those individuals who contribute to the cost of the service.

A. The Fifth Circuit's decision is contrary to decisions of this Court which have defined DFR's scope and purpose as the protection of employment status and have reserved broad discretion to the union in the exercise of its exclusive representative authority.

The fair representation duty's sole aim has previously been to protect employees represented by an exclusive bargaining agent *from harm to their employment rights* through arbitrary exercises of the representative's exclusive authority, *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345

U.S. 330 (1953). The duty has been declared "equal in scope" with the union's exclusive authority and "correlative" thereto, *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 564 (1976); *Int'l Bhd. of Electrical Workers* v. *Foust*, 442 U.S. 52, —— (1979).[5] In exercising its exclusive authority, the union has heretofore enjoyed a "wide range of reasonableness", *Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338, which includes broad discretion in its administration of contract grievance and arbitration procedures, *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967).

Until now, it has been implicit that the fair representation duty is violated only where arbitrary exercise of the union's exclusive authority *jeopardizes some aspect of the employment status of the persons represented*, which the Court of Appeals acknowledged did not occur here. In the arbitration context, this Court has held the duty violated where a union "arbitrarily ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion" *id.* at 191. Absent jeopardy to a person's employment status through the thwarting of a meritorious grievance, a union's grievance administration policies are within the area of discretion protected by *Huffman* and *Vaca*. Here, ALPA placed Del Casal's grievance before the System Board precisely as asked. As stated in *Hines*, where ". . . the union actually utilizes the grievance and arbitration procedures in behalf of the employee, *the focus is . . . on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous out-*

[5] The duty accordingly has not been held to extend to a union's conduct and policies outside the realm of its exclusive agency function, *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, n. 20 (1971); *Kuhn* v. *Nat. Ass'n of Letter Carriers*, 528 F.2d 767, 770 (C.A. 8, 1976); *Archer* v. *Air Line Pilots Ass'n*, 609 F.2d 934, 939 (C.A. 9, 1979), *cert. denied*, 100 S.Ct. 2920.

come of the contractual proceedings." 424 U.S. at 568 (Emphasis added).

By holding the DFR violated where the union's conduct in no way jeopardizes any aspect of employment—indeed even where the underlying grievance is specifically found to be lacking in merit—the newly-declared *per se* rule violates the "focus" mandated by *Hines* and conflicts also with *Huffman* and *Vaca*. It conflicts further with this Courts' recent holding in *Foust, supra,* disallowing punitive damage awards as inconsistent with the duty's compensatory objective. If the duty seeks only to compensate an employee for improper harm to his employment status attributable to his union's abuse of its exclusive authority, it allows no compensation as a threshold matter to a person whose employment rights have not even been violated. Absent improper harm attributable to union misconduct, there is no cognizable harm to compensate. In such a context, a damage award against the union is necessarily punitive contrary to *Foust*.[6]

Here, ALPA neither foreclosed arbitration of Del Casal's grievance nor thwarted its success by perfunctory handling.[7] That ALPA's conduct in this case in no way

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[6] It is no answer to say that the damage award "compensates" Respondent for his fee obligation to retained counsel since that obligation is in no way a consequence, either direct or indirect, of a violation of Respondent's employment rights. As such, Respondent's fee obligation simply is not harm cognizable by DFR consistent with the prior decisions of this Court. Neither Respondent's discharge nor the denial of counsel violated his employment rights; the discharge was duly upheld and the furnishing of counsel was in no way a term of employment under the applicable labor contract. Absent some contract breach or other improper derogation of employment status, there is nothing for the DFR to compensate, *Vaca, supra,* 386 U.S. at 197-198; *Czosek* v. *O'Mara,* 397 U.S. 25, 29 (1970); *Hines, supra.*

[7] Rather than arbitrarily foreclosing arbitration of nonmembers' grievances, see *Hughes Tool Co.* v. *NLRB,* 147 F.2d 69 (C.A. 5, 1945), ALPA placed Del Casal's grievance before the System

jeopardized Del Casal's employment status is beyond dispute and indeed was acknowledged by the Fifth Circuit's affirmance of the judgment upholding the integrity of the System Board proceeding. Had the Fifth Circuit properly conceived the scope and purpose of the fair representation duty, it would have recognized that furnishing or denial of staff counsel does not by itself implicate the duty's concern so long as union action or inaction does not thwart a meritorious grievance and in no way jeopardize rights of employment. Further, had the Fifth Circuit properly respected the "wide range of reasonableness" and "substantial discretion" reserved to the union it would have recognized ALPA's policy of furnishing staff counsel's service to employees who share in its cost through membership dues or agency fee-service charges—and withholding such service from "free riders" —as a reasonable allocation of limited union resources and a clearly proper exercise of discretion. Denial of an expensive service to free-riders, so long as employment status is not jeopardized in the process, harmonizes perfectly with a principal objective of Congress' 1951 Amendment of the Railway Labor Act, namely:

> the elimination of the 'free riders'—those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." See *Int'l Assn. of Machinists* v. *Street*, 367 U.S. 740, 761 (1961); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41 (1954).

The Fifth Circuit's decision is wholly oblivious to the Railway Labor Act policy of discouraging free riders. The fact that ALPA's policy denies counsel to those who pay no share of the cost rather than suggesting breach of the fair representation duty accentuates the policy's reasonableness.

Board thus fully satisfying whatever interest he had under the collective bargaining agreement in receiving a full and fair hearing of his grievance.

Since application of ALPA's staff counsel policy was in no way responsible for Respondent's loss of employment, the Fifth Circuit's *per se* rule holding it in violation of the DFR conflicts with this Court's decisions in *Vaca*, *Hines*, *Huffman*, and *Foust*.

B. The Fifth Circuit's decision conflicts with decisions of other courts of appeals holding that unions may distinguish between members and non-members in the conferral of internal union benefits and with decisions holding that DFR does not require the union to furnish the grievant with counsel.

The Fifth Circuit paid lip service to, but failed to accept the inevitable application of, (1) decisions of other courts of appeals allowing unions to distinguish between members and non-members with respect to internal union benefits, and (2) decisions holding that the duty of fair representation does not require the union to furnish the grievant with counsel. The Fifth Circuit's decision is contrary to these lines of authority. Once the union has exercised its prerogative of invoking arbitration, its policy with respect to furnishing the grievant with counsel—like other internal benefits of union membership, eligibility to participate in union decision-making processes, and eligibility for membership itself—does not threaten derogation of employment status through preclusion of a meritorious grievance or otherwise.

It is settled that the fair representation duty does not require a union to accept any particular individual into membership, *Moynahan* v. *Pari-Mutuel Employees Guild*, 317 F.2d 209, 211 (C.A. 9, 1963). As this Court declared in *Steele* itself, while the union is obliged fairly to protect the employment status of all employees, the Railway Labor Act "does not deny to such a bargaining labor organization the right to determine eligibility to its membership. . . ." 323 U.S. at 204; *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184

(1967). Similarly foreign to exercise of the exclusive agency are a union's policies with respect to eligibility for internal benefits. A union is not obliged to extend to non-members the same insurance or other internal benefits that are enjoyed by members. *NLRB* v. *Automobile Workers*, 222 F.2d 95 (C.A. 7, 1955). Non-members may lawfully be charged a cost-based fee for the privilege of using a hiring hall which members fund through their normal dues, *Local 138, Operating Engineers* v. *NLRB*, 321 F.2d 130, 135, 138-39 (C.A. 2, 1963). The very right to vote on whether or not to ratify a proposed bargaining agreement can be lawfully confined by a union to those employees in the bargaining unit who are members in good standing. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 737 (1963); *Cleveland Orchestra Committee* v. *Musicians, Local 4*, 303 F.2d 229 (C.A. 6, 1962); *Werk* v. *Armco Steel Corp.*, —— F. Supp. ——, 92 LRRM 3393 (S.D. Ohio 1976). The *per se* rule declared by the Fifth Circuit in this case conflicts with the foregoing decisions. ALPA's staff counsel policy—just as much as the internal union benefits and rights involves in those cases—is outside the concern of the DFR so long as the employment status of persons represented is in no way jeopardized by its application.

Until now, no court had held the fair representation duty, in any circumstance, to require a union to furnish counsel for an arbitration proceeding. Indeed, all courts of appeals addressing the question had held that the duty does not require counsel to be furnished, *D'Elia* v. *N.Y., N.H., & H.R.R. Co.*, 230 F.Supp. 912 (D. Conn., 1964), *aff'd* 338 F.2d 701 (C.A. 2, 1964), *cert. denied*, 380 U.S. 978; *Golden* v. *Local 55, Firefighters*, —— F.2d ——, 24 FEP Cases 1340, 1342 (C.A. 9, 1980).[8] Underlying those decisions is recognition that furnishing or

[8] The Fifth Circuit itself had held that furnishing of union counsel is not required by the duty of fair representation, *Grovner* v. *Georgia-Pacific Corp.*, 625 F.2d 1289 (C.A. 5, 1980).

denial of counsel will not by itself, unlike union refusal to invoke arbitration procedures or perfunctory grievance handling, jeopardize employment status by thwarting meritorious grievances.

If furnishing of counsel is not as a general matter required—and the Second and Ninth Circuits have held along with the Fifth Circuit in *Grovner, supra*, that it is not—then it follows *a fortiori* that a policy limiting staff counsel to those paying their fair share of the cost is a reasonable union policy consistent with the fair representation duty. ALPA's policy rather than invidiously discriminating against non-members,[9] simply limits an expensive internal benefit, which unions are not as a general matter required to provide in order to fulfill the duty, to those individuals who pay their fair share of its cost.

As such, ALPA's policy is squarely in line with the contemplation expressed by this Court in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), that participation in union decision-making be limited to union members and that enjoyment of union-funded internal benefits, such as representation by staff counsel here, would be limited to those contributing to the cost. In describing an arrangement under which employees would pay agency fees but could, if they wished, refrain from becoming union members, the Court stated as follows:

> "Employees choosing not to join would make the required payments and, in accordance with union custom, would share in union expenditures for strike benefits, educational and retired member benefits, and union publications and promotional activities, but they would not be entitled to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union." 373 U.S. at 737.

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[9] Notably, ALPA does not deny counsel to all non-members since it provides counsel to those non-members who pay service charges.

ALPA's policy of furnishing counsel as an incident of membership to employees paying membership dues or equivalent service charges is precisely the practice which the Court accepted as customary and contemplated with respect to the broad range of union-funded internal benefits. Such a practice indeed advances the policy of the Railway Labor Act of eliminating "free riders".

Here, as surely as in any case, there has been no frustration of a meritorious grievance whether through preclusion or mishandling of the arbitration remedy, or otherwise. The System Board, after a full and fair hearing in which Del Casal was represented by his own counsel, upheld Eastern's conclusion that Del Casal was not a competent pilot. The integrity of that determination was upheld by judgment of the district court which was affirmed by the Court of Appeals. If ALPA had simply refused Del Casal's request to place his grievance before the System Board and Del Casal had asserted such refusal as a violation of DFR, ALPA could have defended by demonstrating that the grievance was without merit, which is precisely what the System Board duly concluded after a full and fair hearing. In this case, given his grievance's lack of merit, the full and fair hearing which Del Casal received before the System Board appears in retrospect as more than he could have commanded pursuant to the duty of fair representation. Since the sustaining of his discharge was due to his lack of competency as a pilot and his grievance's lack of merit —and not to the denial of counsel or any other conduct of ALPA—no breach of the fair representation duty can be held to have occurred.

* * * *

The Court of Appeals' *per se* rule that unions which provide counsel to grievants in arbitration proceedings must provide this expensive service without regard to whether the particular grievant shares in the cost (1) violates the broad discretion reserved to unions by the

decisions of this Court in *Huffman* and *Vaca*; (2) extends the duty of fair representation in violation of *Vaca* and *Hines* to a union policy which does not threaten harm to the grievant's employment status and, at any rate, manifestly did not harm Del Casal's employment status in this case; (3) disapproves a reasonable union policy in harmony with the Railway Labor Act policy of discouraging "free riders"; and (4) in conflict with *Foust*, upholds a damage remedy where the grievant has suffered no violation of his employment rights and accordingly has no claim cognizable, nor compensable, by the DFR.

The Fifth Circuit's decision in this case will have far-reaching implications for application of the duty of fair representation under both the Railway Labor Act and the Labor-Management Relations Act. The decision passes on a highly significant issue of federal labor law not directly resolved by this Court which fully warrants this Court's review.

CONCLUSION

For the reasons stated, the Petition for Writ of Certorari should be granted; the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNIT B

Nos. 79-1880, 79-2953

J. E. PELAEZ DEL CASAL,
Plaintiff-Appellant,

v.

EASTERN AIRLINES, INC., ET AL.,
Defendants,

EASTERN AIRLINES, INC.,
Defendant-Appellee.

J. E. PELAEZ DEL CASAL,
Plaintiff-Appellee,

v.

EASTERN AIRLINES, INC., ET AL.,
Defendants,

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
Defendant-Appellant.

Jan. 16, 1981

Appeals from the United States District Court
for the Southern District of Florida

Before KRAVITCH and FRANK M. JOHNSON, JR., Circuit Judge, and ALLGOOD*, District Judge.

ALLGOOD, District Judge:

This is a consolidated appeal from the district court's orders in two separate actions resulting from the same facts. In the first case (79-1880) J. E. Pelaez Del Casal appeals from an adverse summary judgment in favor of defendant, Eastern Airlines, relative to the alleged wrongful discharge of appellant as an airline pilot for Eastern. The second case (79-2953) is before the court upon the appeal by the Airline Pilots Association, International (ALPA) from the district court's order granting Del Casal's motion for summary judgment as to liability for the breach of the duty of fair representation and from the district court's orders entering judgment against ALPA in the amount of $35,000 damages and denying a motion for judgment notwithstanding the verdict, or for a new trial, or for remittitur.

I. Facts

Appellant Del Casal was a pilot employed by Eastern Airlines. While employed by Eastern, Del Casal twice unsuccessfully attempted to become a member of ALPA, the exclusive bargaining agent for Eastern's pilots. Both times he was rejected on the basis of his incompetency as a pilot.

On May 29, 1975, Del Casal was discharged from Eastern on the ground that he was an incompetent and unsafe pilot. He immediately filed a grievance pursuant to the collective bargaining agreement between ALPA and Eastern. During the initial stages of the grievance procedure, Del Casal was assisted by John Loomos, an ALPA staff attorney. When the grievance was rejected at the initial stages, Del Casal requested a hearing be-

* Senior District Judge of the Northern District of Alabama, sitting by designation.

fore the Eastern Airlines Pilots System Board of Adjustment (System Board). The System Board, composed of two members from Eastern and two members from ALPA, is an arbitration tribunal established pursuant to the Railway Labor Act, 45 U.S.C. § 184 and the collective bargaining agreement between Eastern and ALPA.[1]

Before the System Board hearing was held, Loomos, the ALPA staff attorney, advised Del Casal that he would not be allowed to represent him at the hearings. ALPA had instructed Loomos to cease handling the case because Del Casal was not a member of the union. In his letter to the appellant informing him that he would no longer be representing him because he was not a union member, Loomos advised Del Casal to retain the services of another attorney. Del Casal took this advice and retained an attorney, David Block, to represent him in the matter.

A four member System Board was convened to consider Del Casal's grievance and his attorney presented a motion based on procedural defects of the discharge.[2] The four member board deadlocked on this issue and, pursuant to the collective bargaining agreement, a fifth neutral member, selected from a list of experienced arbitrators, was added to the board in order to break the deadlock. The five member board met in closed executive session and the deadlock was broken in Del Casal's favor. The board ruled that Eastern could not use evidence which did not comply with the collective bargaining agreement to support Del Casal's discharge.

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[1] The major provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, are applicable to carriers by air. *See* 45 U.S.C. § 181 *et seq.*

[2] The motion contended that Eastern's discharge of Del Casal was wrongful since it was based upon evidence violative of Section 41 of the collective bargaining agreement. Section 41 prohibits the use of disciplinary letters over three years old or letters based upon dissimilar infractions.

Thereafter, the four member board reconvened on September 15, 1976, and on January 11-13, 1977, to determine whether Eastern was justified in terminating Del Casal. Del Casal was represented by retained counsel Block throughout the proceedings. On February 7, 1977, the System Board issued a ruling finding that Eastern was justified in terminating Del Casal.

Subsequently, Del Casal instituted an action seeking to set aside the decision of the System Board and to be granted a *de novo* review of his claim of wrongful discharge. The thrust of his complaint was that his hearing before the System Board was a sham and a mockery of justice because all of the board members were biased against him. A claim was also presented against ALPA for monetary damages resulting from ALPA's alleged breach of its duty of fair representation. The district court granted appellant's motion for summary judgment against ALPA as to liability for the breach of the duty to fairly represent Del Casal and agreed that ALPA had breached that duty by not providing him with an attorney. The court explained that Del Casal was entitled to recover attorney's fees actually paid to his privately retained attorney as well as any other expenses incurred as a direct and proximate result of having to retain private counsel. *Del Casal* v. *Eastern Airlines, Inc.*, 465 F.Supp. 1254 (S.D. Fla. 1979). The cause was set for trial as to these damages. The district court granted Eastern's motion for summary judgment against Del Casal on his claim for wrongful discharge and found that, although ALPA had breached its duty of fair representation to Del Casal, the court did not have jurisdiction over Eastern because the breach of duty did not "substantially undermine" the integrity of the System Board. Thus the district court held that the System Board decision was final and binding on Del Casal and Eastern was dismissed as a party defendant. *Id.* Del Casal's appeal of that part of the court's order which

dismissed Eastern as a defendant is the subject of the first case (No. 79-1880) of this consolidated appeal. Subsequently, a trial was held to determine damages due Del Casal and the jury returned a verdict of $35,000 against ALPA. The district court entered judgment in that amount with interest thereon and costs and also denied ALPA's motion for judgment N.O.V., or for a new trial, or for remittitur. ALPA's appeal of that part of the district court's order granting Del Casal's motion for summary judgment as to ALPA's liability and from the court's orders entering the $35,000 judgment and denying the above motions is the subject of the second case (No. 79-2953) of this consolidated appeal.

II. Del Casal's Appeal (No. 79-1880)

On appeal, Del Casal contends that the decision of the System Board should be set aside on two grounds: (1) he was denied fundamental due process in that he was not accorded a hearing before an impartial tribunal, and (2) the entire arbitral proceedings were seriously undermined by ALPA's breach of its duty of fair representation. He cites *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), and *Wells* v. *Southern Airways, Inc.*, 517 F.2d 132 (5th Cir. 1975), *cert. denied*, 425 U.S. 914, 96 S.Ct. 1512, 47 L.Ed. 2d 765 (1976), and *cert. denied Air Line Pilots Asso., International* v. *Wells*, 425 U.S. 1000, 96 S.Ct. 2217, 48 L.Ed.2d 824 (1976), and *later app. Wells* v. *Southern Airways, Inc.*, 616 F.2d 107 (5th Cir. 1980), in support of these contentions. Neither contention is sufficient, on the facts of these cases, to require setting aside the decision of the System Board.

It is well settled that the Railway Labor Act, under which the Eastern Airlines Pilots System Board of Adjustment was created, allows only limited judicial review of arbitration decisions. In fact, its range is among the narrowest known to the law. *Eastern Airlines, Inc.* v.

Transport Workers Union, 580 F.2d 169, 172 (5th Cir. 1978); *Diamond* v. *Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970). *See also Andrews* v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972). A court may set aside an order of the System Board only on one of three specific grounds: (1) failure of the System Board to comply with the Act, (2) fraud or corruption, or (3) failure of the order to conform or confine itself to matters within the System Board's jurisdiction. 45 U.S.C. § 153(q).[3] *Eastern Airlines*, 580 F.2d at 172; *Diamond*, 421 F.2d at 233.

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[3] 45 U.S.C. § 153(q) provides:

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, *or* is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part or remanded to the division, for failure of the division to comply with the requirements of this Act [45 U.S.C. §§ 151 et seq.], for failure of the order to conform, or confine, itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code [28 U.S.C. §§ 1254, 1291].

Id.

Although in his original complaint Del Casal made allegations covering these three grounds, in his briefs filed on appeal he specifically states that he does not contend that he fits within these statutory exceptions. Instead, appellant argues a judicially created ground for review and contends that the System Board's order should be set aside because all the members of the arbitral body were biased against him; and he was thus denied fundamental due process. He argues that he could not have a fair hearing before a System Board composed of two company appointed members and two union appointed members. However, he has made no showing of partiality or bias on the part of individual members of the System Board.

This court has previously rejected the contention that a System Board's holding must be set aside because there was no one on the board "partisan" to the employee's interests. In *Wells* v. *Southern Airways, Inc.*, 517 F.2d 132 (5th Cir. 1975), plaintiff Wells, also a pilot, made such an argument and prevailed in the district court. This court reversed, noting that all members of the System Board "are charged with the responsibility of impartially deciding the case before the board. The trial court did not find any bias on the part of individual members of the board. No denial of fundamental due process occurred, making the Board's decision final." *Id.* at 134-35, footnote omitted.

Here, as in *Wells*, the members of the System Board were obligated to determine disputes before it in an independent, impartial manner. Absent a showing of partiality or bias on the part of individual members of the System Board, this court will not disturb its conclusions.

Appellant Del Casal also contends that the union's breach of its duty of fair representation so infects the System Board's proceedings that its conclusions must be set aside. In *Hines*, the Supreme Court held that a

union's breach of its duty of fair representation may invalidate an otherwise binding arbitrated decision if it "seriously undermines the integrity of the arbitral process." 424 U.S. at 567, 96 S.Ct. at 1058. Here, the union's breach of its duty of fair representation, which is discussed further below, did not "seriously undermine" the integrity of the arbitral process in this case.

In *Hines*, the union told claimants that they need not hire counsel because the union would process their grievance. However, at the arbitration hearing the union attorney presented no evidence in favor of the claimants, and the arbitrators ruled against them. After arbitration, claimants retained their own counsel who uncovered evidence which exonerated claimants of the charges upon which their discharges from employment had been based. The Supreme Court's focus in *Hines* was upon the claimant's lack of representation which seriously undermined the arbitral process.

In the instant case, however, appellant was advised to obtain counsel, and he did so. Retained counsel represented appellant throughout the arbitration process. There is no claim that a union attorney could have adduced additional evidence in appellant's favor. Thus, appellant's argument that the union's breach undermined the integrity of the arbitration proceeding is mere conjecture and invalid. The district court was, therefore, correct in concluding that the System Board's order denying relief to appellant Del Casal is final and binding and Eastern was correctly dismissed as a party defendant in this case.

III. ALPA's Appeal (No. 79-2953)

A. The Duty of Fair Representation

On appeal, ALPA contends that the district court erred in holding that the union violated its duty of fair representation by refusing to provide Del Casal with a

union staff attorney to represent him at the System Board hearing. ALPA argues that the services of a staff attorney are one of the benefits of union membership and the furnishing of such is not required by contract or law. Furthermore, the union argues that the duty of fair representation does not require a union to accept any particular individual into membership, *Moynahan* v. *Pari-Mutuel Employees Guild of Cal. Local 280*, 317 F.2d 209, 211 (9th Cir. 1963), *cert. denied*, 375 U.S. 911, 84 S.Ct. 207, 11 L.Ed.2d 150 (1963), and that a union is not obliged to extend to nonmembers the same insurance, social, or other internal benefits which are enjoyed by members. *NLRB* v. *International Union, United Auto Workers*, 222 F.2d 95 (7th Cir. 1955). ALPA notes that a union may refuse to prosecute a grievance which it considers to be lacking in merit. *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Sanderson* v. *Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Encina* v. *Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971). Noting also that the district court declined to follow *Encina* because it found that ALPA's refusal to supply a staff attorney was based upon Del Casal's nonmembership, rather than the lack of merit in his grievance, the union argues that Del Casal's nonmembership and the lack of merit in his grievance were only opposite sides of the same coin since Del Casal was refused membership only because of his incompetence as a pilot and that the decision not to supply him with a staff attorney was based on that incompetency.

The court accepts ALPA's arguments that the duty of fair representation does not require a union to accept a particular individual into membership, that a union is not obligated to extend those internal benefits enjoyed by its members to nonmembers, and that a union may refuse to prosecute a grievance which it considers to be lacking in merit; however, these arguments are not dispositive of the issue in this case. The issue in this case is whether

a union may refuse to represent a member of the bargaining unit on the ground that he is not a member of the union without violating its duty of fair representation. Thirty-five years ago this court established the principle that a union may not discriminate against members of its bargaining unit on the basis of that person's status as a nonmember of the union. *Hughes Tool Co.* v. *NLRB*, 147 F.2d 69 (5th Cir. 1945).

The United States Supreme Court noted the exclusive authority of a bargaining agent to represent the interests of all employees without regard to union membership and commented on a union's duty of fair representation in *Hines*, 424 U.S. at 564, 96 S.Ct. at 1056, when it stated that "the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' " That court had earlier defined the union's duty of fair representation in *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, when it stated that the agent's "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177, 87 S.Ct. at 909. The court continued, saying that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916. The proposition that discrimination against nonmember employees who are part of the bargaining unit is impermissibly arbitrary if no relevant distinctions exist between the union and nonunion employees is reiterated in *Deboles* v. *Trans World Airlines, Inc.*, 552 F.2d 1005, 1016 (3rd Cir. 1977), *cert. denied*, 434 U.S. 837, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977).

In the instant case the appellee Del Casal argues that ALPA's discriminatory refusal to allow a staff attorney to represent him at the System Board hearing based upon his nonmember status constituted a breach of ALPA's duty to fairly represent him. We agree. The record shows that ALPA does provide attorneys to grievants at their hearings before the System Board. It is also clear from the record that John Loomos, the ALPA staff attorney, would have represented Del Casal but for the fact that he was not a union member. While ALPA has the authority to decide under what conditions an attorney will be supplied to a grievant, the fact that the grievant is not a member of the union can play no part in that decision.

B. The Damages

Appellant ALPA further contends that Del Casal is not due any damages for the breach of the duty of fair representation and, alternatively, that the damages are excessive. ALPA relies upon the district court's finding that the breach of duty had no prejudicial effect upon the System Board's review and determination of Del Casal's grievance to argue that a monetary award should not be allowed for an employee who, despite the union's breach, has prosecuted his own grievance and received a full and fair hearing. Relying on cases such as *Cronin* v. *Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978); *Deboles* v. *Trans World Airlines*, 552 F.2d 1005; *St. Clair* v. *Local Union No. 515 of Int. Bro. of Teamsters, Inc.*, 422 F.2d 128, 132 (6th Cir. 1969), ALPA presses the argument that where the grievant would have lost even if there were no breach by the union, an award of damages is not permitted. It is ALPA's position that if the grievance process is untainted by a union's breach, the employee is in the same position he would have been had there been no breach and should not be compensated.

The cases relied upon by ALPA are inapposite and mislead because they hold that if a grievance is meritless, a plaintiff suffers no actual loss because of the union breach. ALPA's argument ignores the fact that the plaintiff here suffered loss in the form of fees to be paid to his privately retained attorney. The applicable law on damages in cases such as this was set forth in *Vaca* v. *Sipes*, 386 U.S. at 197, 87 S.Ct. at 920, when the court stated, "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each." *Id.* Here, the damage caused by the union was the attorney's fee which Del Casal incurred as a result of the union's breach. Judgment was correctly entered against ALPA only for the damage caused by the breach of the duty to fairly represent Del Casal in the System Board hearings.

ALPA argues, alternatively, that the $35,000 awarded by the jury is excessive and that the court erred in refusing to impose a remittitur upon the jury's award. We do not agree. The jury's award was well within the limits of the proof. In order for an award to be reduced, "the verdict must be so gross or inordinately large as to be contrary to right reason." *Machado* v. *States Marine-Isthmian Agency, Inc.*, 411 F.2d 584, 586 (5th Cir. 1969). The court "will not disturb an award unless there is a clear showing that the verdict is excessive as a matter of law." *Anderson* v. *Eagle Motor Lines, Inc.*, 423 F.2d 81, 85 (5th Cir. 1970). The award, in order to be overturned, must be "grossly excessive" or "shocking to the conscience." *LaForest* v. *Autoridad de Las Fuentas Fluviales*, 536 F.2d 443 (1st Cir. 1976). Plaintiff's testimony showed that a reasonable hourly fee for his attorney could have been $75.00 per hour. The testimony showed that the attorney had spent 783 hours in the preparation and trial of the System Board case which dragged on for over a year. While defendant pro-

duced conflicting testimony, the jury's award was well within the evidence presented.

We have considered the other points raised by the appellants and find them to be without merit. Both cases are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2953

D.C. Docket No. 77-2279-Civ-JAC

J. E. PELAEZ DEL CASAL,
Plaintiff-Appellee,

versus

EASTERN AIRLINES, INC., ET AL.,
Defendants,

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before KRAVITCH and FRANK M. JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

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* Senior District Judge of the Northern District of Alabama, sitting by designation.

of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 16, 1981

Issued as Mandate: Mar. 3, 1981

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* Senior District Judge of the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 79-2953

J. E. PELAEZ DEL CASAL,
Plaintiff-Appellee,

versus

EASTERN AIRLINES, INC., ET AL.,
Defendants,

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion January 16, 1981,

5 Cir., 198—, —— F.2d ——).

(February 18, 1981)

Before KRAVITCH and FRANK M. JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procdure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

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* Senior District Judge of the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 79-2953

J. E. PELAEZ DEL CASAL,
Plaintiff-Appellee,

versus

EASTERN AIRLINES, INC., ET AL.,
Defendants,

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
a labor organization,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of appellant, AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellant, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, for stay of the issuance of the mandate pending petition for writ

of certiorari is GRANTED to and including April 10, 1981, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue that mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ _____ for a further stay of the issuance of the Mandate is DENIED.

/s/ Phyllis Kravitch
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
APR 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

J. E. PÉLAEZ DEL CASAL and EASTERN AIR LINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2279-CIV-JAG

J. E. PELAEZ DEL CASAL,
Plaintiff,

vs.

EASTERN AIRLINES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS CAUSE is before the Court upon the Motion for Partial Summary Judgment of the Plaintiff, J. E. Pelaez Del Casal ("Casal"); and the Motion for Summary Judgment of the Defendant, Airline Pilots Association, International ("ALPA"). The Defendant, Eastern Air Lines, Inc. ("Eastern"), renewed its Motion for Summary Judgment at the hearing of the motions for Summary judgment of Casal and ALPA.

The Court finds that the Plaintiff, J. E. Pelaez Del Casal, is entitled to Summary Judgment as to Count II against the Defendant, Airline Pilots Association International, based upon a breach of ALPA's duty of fair representation.

The Court further finds that the Defendant, Eastern Airlines, is entitled to Summary Judgment as to Count I based upon wrongful discharge.

I. *THE FACTS*

The Plaintiff, Del Casal, was a pilot employed by the defendant, Eastern. While so employed he was unsuccessful in several attempts to become a member of ALPA. ALPA is the exclusive bargaining agent for Eastern's pilots.

On May 29, 1975, Del Casal was discharged from his employment with Eastern. Del Casal immediately filed a grievance pursuant to the terms of the collective bargaining agreement between ALPA and Eastern. The grievance procedure allows a disciplined or discharged pilot to have his case reviewed by specified high-level company officials. The plaintiff was assisted by an ALPA staff attorney during the initial grievance procedure.

Having failed to reverse his discharge, Del Casal requested ALPA to submit his grievance to the Eastern Airlines Pilots System Board of Adjustment. ("System Board"). The System Board was established under the collective bargaining agreement as required by the Railway Labor Act, 45 USC § 184, to settle disputes between pilots and Eastern. The System Board is composed of two members selected by ALPA. The collective bargaining agreement also provides for a fifth neutral member, selected from a pre-composed list of experienced arbitrators, to be seated when the four man board becomes deadlocked. The partisan board members are contractually assured the right to discharge their duties "in an independent manner."

ALPA staff attorney, John Loomos, submitted Del Casal's grievance to the System Board on July 8, 1975. The issue presented to the System Board was whether Eastern was justified in discharging Del Casal for the reasons stated in the letter of discharge dated May 29, 1975. The letter of discharge cited repeated instances of demonstrated incompetence despite warnings and retraining sessions.

Del Casal's position at the System Board was that his discharge was wrongful in two interrelated respects. First, Del Casal contended that Eastern violated the procedural provisions of the bargaining agreement by considering evidence in violation of Section 41 (I) which prohibits the use of disciplinary letters over three years

old, or letters based upon dissimilar infractions. Second, he contended that based upon the untainted evidence, the termination was not based upon good cause.

Subsequent to the filing of Del Casal's grievance with the System Board by John Loomos, but prior to the actual hearing, the plaintiff was advised by Mr. Loomos, ALPA's staff attorney, that he would not be allowed to represent the plaintiff at the hearing. Mr. Loomos' letter stated, "I was recently advised by the association that I could not represent you at the hearing to be held by the System Board of Adjustment *because you are not a member.*" (emphasis added). The letter continued by advising the plaintiff that it would be wise for him to request a continuance and retain the services of an attorney.

On September 12, 1975 David Block, a privately retained attorney, notified the System Board that he would be representing Del Casal at the hearing. On January 8, April 13-14, and June 2, 1976 a four member System Board was convened to consider the dispute between Del Casal and Eastern. At the June 2, 1976 session Del Casal's attorney presented a motion contending that Eastern's discharge was wrongful since it was based upon evidence violative of Section 41 of the collective bargaining agreement.

The four member board dead-locked on the procedural issue of whether Eastern could or could not use certain evidence as a predicate for establishing good cause to terminate Del Casal. On June 29, the four member board issued its ruling noting that it was dead-locked and that the issue would be presented to a fifth neutral member. On July 2, 1976 David Block informed the board that it was his desire to have *only* the procedural issue decided by the neutral.

On August 10-11, 1976 the five member board convened to determine the procedural issue. Eastern initially submitted evidence and gave legal argument in support of its use of the disputed evidence. Del Casal maintained that said evidence was not admissible under the collective bargaining agreement. Mr. Block was advised that he would be given adequate opportunity to rebut the testimony produced by Eastern. At the close of Eastern's case, however, the System Board met in a closed executive session. The five member board then agreed with plaintiff decided that Eastern could *not* use evidence not in accordance with Section 41 of the agreement to support its termination of plaintiff.

The four member board thereafter again convened on September 15, 1976 and on January 11-13, 1977 to determine whether Eastern was justified in terminating the plaintiff considering only such evidence as was not in violation of the collective bargaining agreement. On February 7, 1977 the System Board issued a ruling finding that Eastern was justified in terminating Del Casal.

The plaintiff then instituted this action seeking to set aside the decision of the System Board and a de novo review of his claim of wrongful discharge. The plaintiff also presses a claim against ALPA for monetary damages alleging a breach of its duty of fair representation.

In attempting to set aside the decision of the System Board the plaintiff alleges that the System Board hearing denied his procedural due process by not allowing him to rebut the testimony presented by Eastern to the five member board. The plaintiff further argues that the System Board decision is ipso facto not entitled a judicial cloak of finality since it is the result of ALPA's breach of duty to fairly represent him. *e.g. Ferdnance* v. *Automobile Transport, Inc.*, 460 F.Supp. 1207 (E.D. Mich. 1978).

II. *DUTY OF FAIR REPRESENTATION*

The plaintiff contends that ALPA breached its duty of fair representation by refusing to allow its staff attorney, John Loomos, to represent him at the System Board hearing. ALPA states that it has no duty to furnish grievants an attorney at System Board hearings; and, indeed, that it has no duty to proceed with any grievances that it finds unmeritorious.

Although the Court accepts the arguments asserted by ALPA they are not dispositive of the issue before the Court. It is true that ALPA has no duty to supply a grievant with an attorney at a System Board hearing. *Edwards* v. *St. Louis-San Francisco Railroad Company*, 361 F2d 946, 954 (7th Cir. 1966); *Butler* v. *Thompson*, 192 F2d 831 (8th Cir. 1951); *Broady* v. *Illinois Central Railroad Company*, 191 F2d 73 (7th Cir. 1951, *Cert. Den.* 342 U.S. 897 (1951); *Brooks* v. *Chicago, Rock Island & Pacific Railroad Company*, 177 F2d 385 (8th Cir. 1949); *Ciaceio* v. *Eastern Airlines*, 354 F.Supp. 1272 (E.P.N.Y. 1973); *D'Elia* v. *New York, New Haven & Hartford Railroad Company*, 230 F.Supp. 1912 (D.Conn. 1946); *D'Amico* v. *Pennsylvania Railroad Company*, 191 F.Supp. 160 (S.D.N.Y. 1961). See Also, *Crusco* v. *Fisher & Brother, Inc.*, 458 F.Supp. 413, 422 (S.D.N.Y. 1978). *Florey* v. *Air Line Pilots Association International*, 439 F.Supp. 165, (D. Minn. 1977).

It is also true that ALPA has no duty to press claims before the System Board on behalf of grievants which it finds in good faith to be without merit. *Ford Motor Company* v. *Huffman*, 345 US 330, 338 (1953); *Humphrey* v. *Moore*, 375 US 335, 349 (1964); *Motor Coach Employees* v. *Lockridge*, 403 US 274 (1971); *Sanderson* v. *Ford Motor Company*, 483 F2d 102 (5th Cir. 1973); *Encia* v. *Tony Lama Boot Company*, 448 F2d 1264 (5th Cir. 1971); and *Acuff* v. *United Papermakers and Paperworkers*, 404 F2d. 169 (5th Cir. 1968). It has been

held that a local union official need not even forward a grievance to the union legal department if he, in good faith, believes the claim to be without merit. *Hubicki* v. *A.C.F. Industries, Inc.*, 484 F2d 519 (3rd Cir. 1973).

ALPA, however, did process plaintiff's claim and presented it to the System Board. In *N.L.R.B.* v. *P.P.G. Industries, Inc.*, 579 F2d 1057, 1059 (7th Cir. 1978), it was recognized that "while a union has wide discretion in deciding whether to take a grievance to arbitration, once the claim is taken to arbitration, the union must advocate the employee's position."

Furthermore, ALPA does provide attorneys to grievants at their hearings before the System Board. Indeed, it is clear from the letter written by John Loomos, staff attorney for ALPA, and from ALPA's answers to plaintiff's interrogatories, that Mr. Loomos would have represented the plaintiff but for the fact that he was not a union member.

In, *Hines* v. *Anchor Motor Freight, Inc.* 424 U.S. 554 (1976) the United States Supreme Court noted the exclusive authority of a bargaining agent to represent the interests of all employees *without regard to union membership*, and stated that "the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, the responsibility and duty of fair representation." *id.* at 564. The *Hines* decision reaffirmed the court's earlier holding in *Vaca* v. *Sipes*, 386 US 171, 177 (1967), that the agent's "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and honesty, and to avoid arbitrary conduct." The court continued by stating that "[a] breach of the statutory duty of fair representation oc-

curs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, *or* in bad faith." *id* at 190. (emphasis supplied)

It is important to note that the union can breach its duty of fair representation by willfully acting in a manner which is arbitrary *or* discriminatory *or* in bad faith. The Supreme Court has stated these factors in the disjunctive. See, *Burchfield* v. *United Steelworkers of America, AFL-CIO*, 577 F2d 1018 (5th Cir. 1978); and *Franklin* v. *Crosby Typesetting Company*, 568 F2d 1098 (5th Cir. 1978). Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action. *Griffin* v. *International Union of United Automobile Workers*, 469 F2d 181, 183 (4th Cir. 1974). The Sixth Circuit, in *Ruzicka* v. *General Motors Corporation* 523 F2d 306 (6th Cir. 1975) held that bad faith is not an essential element of a claim of unfair representation. "Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation." *id.* at 310.

Likewise the First Circuit, in *DeArroyo* v. *Sindicato De Trabaiadores Packinghouse, AFL-CIO*, 452 F2d 281 (1st Cir.) *Cert. den.*, 400 U.S. 877 (1970) found that a good faith decision which amounted to arbitrary action by a bargaining agent would support a finding of unfair representation. See also, *Robesky* v. *Quantas Empire Airways Limited*, 573 F2d 1082 (9th Cir. 1978); *Savel* v. *Detroit News*, 435 F.Supp. 329 (E.D. Mich. 1977); *Tufts* v. *United Postal Service*, 431 F.Supp. 484 (N.D. Ohio 1976); and *Fleming* v. *Chrysler Corporation*, 416 F.Supp. (E.D. Mich. 1975); cf, *Lowe* v. *Pate Stevedoring Company*, 558 F2d 769, 770, fn. 2 (5th Cir. 1978).

Plaintiff argues that ALPA's discriminatory refusal to allow a staff attorney to represent plaintiff at the System Board hearing based upon his non-member status con-

stituted a breach of ALPA's duty to fairly represent him.

This Court agrees.

"A union has no more justification to discriminate injuriously in its representation on the ground of non-membership or instability of membership, or even because of persistent and vocal complaints or other obnoxious behavior, than it has to discriminate on account of skin pigmentation." *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.Supp. 191, 199 (4th Cir. 1963); See also, *Godowski* v. *Penn Central Transportation Company*, 571 F2d 747 (3rd Cir. 1977); *Turner* v. *Air Transport Dispatchers Assoc.* 468 F2d 297 (5th Cir. 1972); and *Hughes Tool Company* v. *N.L.R.B.*, 147 F2d 69 (5th Cir. 1945), and *Wells* v. *Southern Airways, Inc.*, 517 F2d 132 (5th Cir. 1975).

Although Congress has given unions broad discretion to select their own policies and rules, *Chrapliwy* v. *Uniroyal, Inc.*, 458 F.Supp. 252, 282 (N.D. Ind. 1977), it did not "authorize a tyranny of the majority over minority interests." *Emporium Capwell* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). While ALPA has the power to determine under what conditions an attorney will be supplied a grievant, non-membership is a factor which can play no part in its decision.

III. *WRONGFUL DISCHARGE*

Plaintiff alleges that he is entitled to a de novo determination as to Eastern's justification for his discharge, a finding that Eastern lacked good cause to discharge him from employment, and money damages. The defendant contests this Court's jurisdiction to grant the plaintiff a de novo review. 45 USC 153(p). To circumvent the cloak of finality accorded a System Board decision, *East-*

ern Air Lines v. *Transport Workers Union, AFL-CIO*, 580 F2d 169 (5th Cir. 1978), plaintiff argues that he was denied a fair hearing.

In support of this charge plaintiff relies upon (1) the five member boards refusal to hear argument on his procedural motion; and (2) ALPA's breach of its duty of fair representation.

The Court does not believe that the five member boards decision prejudiced plaintiff's cause since in ruling upon his motion the plaintiff prevailed. Indeed, the System Board of Adjustment in its final decision dated February 7, 1977 specifically adopted plaintiff's position when it stated, "In making this ruling, the Board used only that evidence that was not in violation of Sections 29 and 41 of the agreement."

As the procedure adopted by the five member board in no way prejudiced plaintiff, this Court will not disturb the System Board decision on this ground. See e.g. *Crusco* v. *Fisher & Brother, Inc.*, 458 F.Supp. 413, 422 (S.D.N.Y. 1978).

Plaintiff further argues that ALPA's breach of its duty of fair representation so tainted the System Board hearing that it render(ed) its decision ipso facto unfair. In addressing this issue, the United States Supreme Court held that a union's breach of duty will remove the bar of finality which protects System Board decisions only "if it seriously undermines the integrity of the arbitral process." *Hines* v. *Anchor Motor Freights, Inc.*, 424 U.S. 554, 567.

ALPA did breach its duty of fair representation by not providing the plaintiff with an attorney during the System Board hearing. At that point plaintiff would have been justified in not pursuing further his contract remedies before the System Board. *Hines* v. *Anchor Motor Freight, Inc., supra.* Plaintiff, however, after having re-

tained his own attorney, elected to continue the prosecution of his claim through the arbitration process. The plaintiff canont now be heard to complain of the "integrity" of the System Board process because he was represented by a private attorney of his own choosing rather than by a staff attorney supplied by ALPA.

The Railroad Labor Act allows only limited judicial review of System Board decisions. *Eastern Airlines, Inc.* v. *Transport Workers Union, AFL-CIO, supra.* It has been stated that the scope of judicial review is "among the narrowest known to the law." *Diamond* v. *Terminal Ry. Alabama State Docks,* 421 F2d 228, 223 (5th Cir. 1970). The only grounds for setting a System Board decision aside are (1) failure of the board to comply with the act, (2) fraud or corruption, or (3) failure of the order to conform or confine itself to matters within the board's jurisdiction. 45 USC 153(a).

The plaintiff has failed to show facts coming within any of the three exceptions. The decision of the System Board is, therefore, final. *International Union of Electrical Radio & Machine Workers AFL-CIO* v. *Markle Manufacturing Company,* 582 F2d 9 (5th Cir. 1978); *General Warehouseman and Helpers Local 767* v. *Standard Brands, Inc.,* 579 F2d 1282 (5th Cir. 1977).

It is thereupon

ORDERED AND ADJUDGED as follows:

(1) Defendant-Airline Pilots Association, International's Motion for Summary Judgment is hereby DENIED.

(2) Plaintiff's Motion for Summary Judgment against the Airline Pilot's Association, International is hereby GRANTED as to liability. The cause will be set for trial as to damages by future order of this Court.

(3) Defendant-Eastern Airline's Motion for Summary Judgment upon plaintiff's claim of wrongful discharge

is hereby GRANTED; and Eastern Airlines, Inc. is hereby DISMISSED as a party defendant to this cause.

DONE AND ORDERED at the U. S. Courthouse in Miami, Florida this 1st day of March, 1979.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
United States District Court

Copies furnished counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2279-CIV-JAG

J. E. PALAEZ DEL CASAL,
Plaintiff,

vs.

EASTERN AIR LINES, INC., *et al.*,
Defendants.

ORDER

THIS CAUSE has come before the Court for review upon the Plaintiff's Motion for Clarification. The Court has heretofore determined that the Defendant, Air Line Pilots Association has breached its duty of fair representation by not furnishing the Plaintiff a staff attorney at the Plaintiff's hearing before the Systems Board. The Court has also determined, upon the undisputed operative facts, that the Air Line Pilots Association's breach of its duty to furnish the Plaintiff an attorney did not "seriously undermine the integrity of the arbital process."

It is clear that the Plaintiff cannot recover any damages based upon his discharge from employment by Eastern Air Lines, Inc. It is equally clear that the Plaintiff is entitled to recover attorney's fees actually paid to Plaintiff's privately retained attorney, as well as any other expenses incurred as a direct and proximate result of having to retain private counsel.

Whether the Plaintiff will be entitled to recover punitive damages is an issue which this Court can not decide at this time. This cause has been set for trial on this issue. The Court would note however, that there is presently nothing in the record which would warrant the recovery of punitive damages from the Air Line Pilots Association. It is accordingly

ORDERED AND ADJUDGED that the Plaintiff's Motion for Clarification is GRANTED as hereinabove set forth; in all other respects it is DENIED.

DONE AND ORDERED in chambers at Miami, Florida this 29th day of March, 1979.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2279-CIV-JAG

J. E. PELAEZ DEL CASAL,
Plaintiff,
vs.

EASTERN AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization,
Defendants.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Jose A. Gonzalez, Jr., District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED AND ADJUDGED

That the plaintiff J. E. PELAEZ DEL CASAL recover of the defendant AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, the sum of Thirty-five Thousand and no/100 ($35,000.00) Dollars, with interest thereon as provided by law, and his costs of the action, for which let execution issue.

Dated at Fort Lauderdale, Broward County, Florida, on this 17th day of July, 1979.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
United States District Judge

copies furnished to:

Gary D. Fox, Esq.
George Tucker, Esq.
James W. Tello, Esq.
Carmen Leon & William Bell, Esqs.
David Block, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 77-2279-CIV-JAG

J. E. PELAEZ DEL CASAL,
Plaintiff,

vs.

EASTERN AIR LINES, INC.,
Defendants.

ORDER

THIS CAUSE has come before the Court for review upon the Motion for Judgment Notwithstanding the Verdict or for a New Trial filed on behalf of the Defendant, Air Line Pilots Association, International. The Court has considered the record, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that the Defendant's Motion be and the same hereby is, DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida this 31st day of July, 1979.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
United States District Judge

Office-Supreme Court, U.S.
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No. 80-1695

In the Supreme Court of the United States

October Term, 1980

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

vs.

J. E. PELAEZ DEL CASAL, and
EASTERN AIR LINES, INC.
Respondents.

RESPONDENT J. E. PELAEZ DEL CASAL'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Honorable Court should exercise its discretion and review a decision of the Court of Appeals which merely applied the well-settled rule of law that a union, in the treatment of employees within its bargaining unit, may not discriminate against those employees based on their status as non-members of the union.

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No. 80-1695

In the Supreme Court of the United States

October Term, 1980

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

vs.

J. E. PELAEZ DEL CASAL, and
EASTERN AIR LINES, INC.
Respondents.

RESPONDENT J. E. PELAEZ DEL CASAL'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner AIR LINE PILOTS ASSOCIATION'S (ALPA) Statement of the Case is misleading, omits the most material facts and, in places, is simply inaccurate. The Respondent J. E. DEL CASAL [hereinafter referred to as the Plaintiff], is compelled, therefore, to offer the Court the following statement of the case.

In May, 1975, the Plaintiff, an airline pilot employed by EASTERN AIR LINES, was discharged by EASTERN.

Shortly thereafter, the Plaintiff approached an ALPA staff attorney in Miami, Florida, John Loomos, for the purpose of obtaining ALPA representation to contest his termination. (R. 82, p. 12). Mr. Loomos, within a short period of time, took the necessary steps to insure that a grievance was timely filed on behalf of the Plaintiff, pursuant to the terms of the collective bargaining agreement (hereinafter referred to as the "contract") between EASTERN and ALPA. (R. 82, pp. 13-14). The grievance was summarily rejected at the initial stages, as are the vast majority of grievances (R. 82, p. 16), and preparation was begun for a hearing before the Eastern Air Lines System Board of Adjustment (hereinafter "System Board"). The System Board is an arbitration tribunal established pursuant to the Railway Labor Act and the collective bargaining agreement entered into between EASTERN and ALPA. (R. 666-674).

Mr. Loomos, an ALPA staff attorney with some 15 years' experience, was the person who initiated the grievance mechanism on behalf of the Plaintiff (R. 82, p. 17) and, at that time, intended to represent him in his hearing before the System Board. (R. 82, p. 35). After doing some preliminary investigation into the background of Plaintiff's termination and speaking with several pilots about Plaintiff, Mr. Loomos determined that Plaintiff had a *meritorious grievance*. (R. 82, p. 32).

Mr. Loomos further testified that in the course of his entire investigation into the merits of Plaintiff's grievance, no one from EASTERN or ALPA or any other organzation told him that Plaintiff did not have a meritorious grievance. (R. 82, p. 55).

In order for Plaintiff's termination to be upheld, "just cause" must have existed for his termination (R. 82, p.

24); that is, there must have existed "some really compelling reason" (R. 82, p. 24) for firing him.

Prior to the System Board proceedings, Mr. Loomos testified that "the only criticism that I heard about [Plaintiff] was that they [certain EASTERN pilots] did not like him, that he had some personality problems." (R. 82, p. 76). Personality differences, however, were not grounds for termination under the "just cause" rule. (R. 82, pp. 55-56).

Shortly before the first scheduled System Board hearing, Mr. Loomos was ordered by his superiors at ALPA not to represent the Plaintiff because he, the Plaintiff, was not an ALPA member. (R. 82, p. 36). Mr. Loomos then wrote a letter to the Plaintiff advising him that "I was recently advised by the association that I could not represent you at the hearing to be held by the System Board of Adjustment *because you are not a member* [of ALPA]". (R. 959, emphasis added).

During discovery, the Defendant ALPA admitted, in its own answers to Plaintiff's interrogatories, that the reason it refused to represent him in the System Board hearings was that Plaintiff was not a member of ALPA. A gentleman named Seth Rosen, an ALPA lawyer in charge of all other ALPA staff lawyers, testified in deposition that ALPA has a general policy "not to represent nonunion members of the bargaining unit. This is a general policy." (*Rosen* at 34, L. 10). He further stated that even if ALPA became aware that an employer had falsified performance reports for the purpose of securing the discharge of a non-member, ALPA would do nothing to help or represent the non-member aside from explaining the grievance procedure and providing two members of ALPA to sit on the System Board. (*Rosen* at 55-56). In fact, Mr. Rosen testified that,

in the case of the termination of a non-member, ALPA does not even have a duty to investigate the validity of charges. (*Rosen* at 57-58).

ALPA's legal department also adheres to the policy discussed above. In a letter from ALPA's legal director to Mr. Otto Schick, a local ALPA official, who had requested advice as to whether ALPA should represent Plaintiff, the director states as follows:

> However, non-members are not entitled to utilize the services of ALPA staff attorneys in the course of grievance proceedings. ALPA policy contemplates that such attorneys' services be made available only to those who contribute their share of the financial costs involved. (Exhibit 28).

Mr. Schick, the chairman of ALPA's local Eastern Air Lines chapter, testified that he had unilaterally decided that the pilots of Eastern Air Lines had spent too much money defending non-ALPA pilots and, at the next opportunity, would determine what "minimal entitlement" a non-member should receive. (*Schick* at 32). The next opportunity happened to be Plaintiff's termination.

After being advised that ALPA would not represent him, Plaintiff, upon the recommendation of Mr. Loomos, retained private counsel to represent him. (R. 679). The attorney who represented Plaintiff before the System Board was David Block, who, in contrast to Mr. Loomos' fifteen years of experience, was a young lawyer approximately one year out of law school with no prior System Board experience. (R. 213, pp. 3, 18). Mr. Block, in his representation of Plaintiff, was at a distinct disadvantage in comparison to Mr. Loomos because of his (Mr. Block's) lack of practical aviation knowledge and unfamiliarity with the terms of the collective bargaining agreement. (R. 82, pp. 57-58, 71-72).

Following a series of bizarre hearings before the System Board of Adjustment,[1] Plaintiff's termination was predictably upheld.[2]

Plaintiff would call to the Court's attention the Petitioner's representation in its brief that ". . . [t]he record shows that not only did Loomos aid Del Casal at the initial stages of his grievance, but also that he attempted to appear at the System Board hearings in order to assist, but was excluded by Block . . . ." Petitioner's brief at 3, n. 4. That representation is patently false. Mr. Loomos himself said that, after the first hearing, he attended none of the other hearings *because he was instructed not to by the head of the local ALPA Office, Otto Schick.* Loomos deposition at 44.

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1. The initial System Board panel, composed of four members, reached a 2-2 deadlock. Pursuant to the provisions of the collective bargaining agreement a fifth "neutral" member was thereafter appointed to break the deadlock and the procedural issue of whether Plaintiff should be reinstated came on for hearing before the "5-man" Board. The Defendant EASTERN presented its side of the case, following which the Board went into "executive session" and shortly thereafter "undeadlocked" and determined that the procedural manner in which Plaintiff had been terminated was proper and that the 4-man board should proceed to hear the merits of the case. (R. 829). Prior to the Board "undeadlocking," Plaintiff was given no opportunity whatsoever to present evidence or call witnesses to address the issue which the 5-man Board had been empaneled to hear, to wit: whether the way in which Plaintiff was terminated was so flawed as to require reinstatement. (R. 829).

2. The decision was predictable because the issue of Plaintiff's termination was tried before four people, two of whom represented the employer (EASTERN) which fired Plaintiff in the first instance, and two of whom represented the union which, prior to hearing the first word of testimony, had agreed with EASTERN that Plaintiff had been properly terminated. (R. 601). It is undisputed that no one disclosed to Plaintiff or anyone else the fact that both *ALPA* and Eastern had pre-determined the issue to be tried. Predictably, the System Board ultimately upheld Plaintiff's termination. (R. 685). The opinion of the System Board specifically stated that the decision in Plaintiff's case should not be considered "precedent" for other System Board cases. (R. 685).

Plaintiff then instituted the present action against EASTERN for wrongful discharge and ALPA for breach of the duty of fair representation. After discovery, the trial court, on March 1, 1979, entered a memorandum opinion and order in which it found that ALPA had breached its duty of fair representation because it had discriminated against the Plaintiff on the grounds of non-membership. In the same order, the court granted EASTERN's motion for summary judgment against the Plaintiff, finding that although ALPA had breached its duty of fair representation by not representing the Plaintiff before the System Board, the court did not have jurisdiction over EASTERN because the breach of the duty did not "substantially undermine" the integrity of the System Board. In other words, the district court held that the decision of the System Board was final and binding on the Plaintiff and precluded this action by him. (R. 957-965).

On July 12 and 13, 1979, the case proceeded to a jury trial against the Defendant ALPA on the issue of damages. The jury returned a verdict in Plaintiff's favor of $35,000.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the trial court's rulings in all respects. *Del Casal v. Eastern Air Lines, Inc.*, 634 F.2d 295 (5th Cir. 1981). Thereafter, ALPA filed the present petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Rule 17 of the Rules of the Supreme Court provides that this Honorable Court will review decisions of Courts of Appeal by writ of certiorari ". . . only when there are special and important reasons therefor." Included within this category are decisions which conflict with those of other circuits and those which have ". . . so far departed

from the accepted and usual course of judicial proceedings, or so far sanctioned a deparature by the lower court . . ." as to necessitate the exercise of this Court's supervisory power. Respondents respectfully submit that the present case fits within none of the categories of Rule 17, but merely represents an application of well-settled principles of law to the particular facts of this case.

When one cuts through all of the confusing verbiage of the Petition, it becomes clear that Petitioner's only argument is that the decision below:

> . . . establishes a *per se* rule that unions which furnish counsel to dues-paying members and to agency fee payors must provide the same service to non-members who pay no part of the cost of the service.

(Petitioner's brief at 5.)

The "per se" rule to which ALPA frequently refers in the course of its brief,[3] was created by, and exists only in the imagination of ALPA. There is certainly no language in the Fifth Circuit's opinion which even suggests, much less establishes anything even remotely resembling a "per se" rule.

What ALPA has done is to manufacture an imaginary holding on the part of the Fifth Circuit, the purpose of which is to grab the Court's attention. Plaintiff readily acknowledges that if, as Petitioner contends, the Court of Appeals had mandated a "per se" rule requiring unions to provide non-members with attorneys in grievance proceedings, such a ruling would indeed be a novel one. Even the most superficial reading of the decision below, however, reveals that the Fifth Circuit *specifically refrained* from making the ruling which Petitioner alleges was part of the court's holding.

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3. See pages 5, 7, 9, 10 and 12 of Petitioner's brief.

The Fifth Circuit held that because ALPA's decision not to represent the Plaintiff was based solely on his status as a non-union member, ALPA had violated the cardinal rule that a union, in its treatment of employees within its bargaining unit, may no more discriminate on the basis of non-membership than on the basis of race, religion or national origin. 634 F.2d at 301. The proscription against discrimination on the basis of non-membership is well-settled. *Turner v. Air Transport Dispatchers Ass'n,* 468 F.2d 297, 301 (5th Cir. 1972); *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F.2d 191 (4th Cir. 1963); *Hughes Tool Co. v. NLRB,* 147 F.2d 69, 74 (5th Cir. 1945).

ALPA acknowledges that the sole reason it refused to allow its attorney, John Loomos, to represent the Plaintiff was because the Plaintiff was not an ALPA member. Parenthetically, Plaintiff would point out to the Court that ALPA's decision was particularly unjust in light of the fact that Mr. Loomos, who investigated the facts and circumstances surrounding Plaintiff's termination, determined that Plaintiff had a meritorious grievance. (R. 82, p. 32).

Thus, all that the Fifth Circuit did in the present case was to find that, in light of ALPA's own admissions that Plaintiff had a meritorious grievance and that it refused to represent him simply because he was not a member of the union, ALPA had violated its duty of fair representation. The Court of Appeals most assuredly did not establish a ". . . *per se* rule that unions which provide counsel to grievants in arbitration proceedings must provide this expensive service without regard to whether the particular grievant shares in the cost . . .". Petitioner's brief at 12. It is of particular interest that Petitioner is unable to cite to this Court *any language whatsoever* from the opinion of the Fifth Circuit which supports its position.

Petitioner advises the Court that the decision below will somehow require unions to extend to non-members all

benefits incident to union membership and that it will further require unions to provide attorneys to grievants even if the union considers the grievance to be lacking in merit. For ALPA to advance such a contention is remarkable. The Fifth Circuit, far from rejecting ALPA's position on these issues, unequivocally recognized these doctrines:

> The court accepts ALPA's arguments that the duty of fair representation does not require a union to accept a particular individual into membership, that a union is not obligated to extend those internal benefits enjoyed by its members to nonmembers, and that a union may refuse to prosecute a grievance which it considers to be lacking in merit; however, these arguments are not dispositive of the issue in this case. (634 F.2d at 300).

The opinion below then proceeds to discuss the real issue in the case, to wit: whether ALPA could discriminate against members of the bargaining unit which it represents on the basis of non-membership in the union. The court properly held, under the authorities cited *supra*, that to do so constituted a violation of ALPA's duty of fair representation.

The court below also recognized and affirmed the proposition of law which ALPA states it abolished, to wit: the union has the authority to decide, if it does so in a nondiscriminatory manner, when it may supply an attorney to represent a grievant:

> While ALPA *has the authority to decide under what conditions an attorney will be supplied to a grievant,* that fact that the grievant is not a member of the union can play no part in that decision. (634 F.2d at 301, emphasis supplied).

Petitioner contends that the decision below conflicts with and/or extends in some manner this Honorable

Court's holding in *Vaca v. Sipes,* 386 U.S. 177 (1967). In that case the Court defined the basic duty of fair representation in the following terms:

> Under this doctrine, the exclusive agent's statutory authority to represent *all members* of a designated unit includes a statutory obligation to *serve the interest of all members without hostility or discrimination toward any,* to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. (386 U.S. at 177, emphasis supplied).

Far from conflicting with *Vaca v. Sipes, supra,* the Fifth Circuit expressly recognized the principles of law set forth above and applied them to the facts of this case. 634 F.2d at 301. The finding of the court below that ALPA had violated its duty of fair representation by not representing Plaintiff because he was not a member is a direct application of the doctrine of *Vaca v. Sipes, supra,* which requires non-discriminatory treatment of all members of the bargaining unit, regardless of the employee's union affiliation.

Finally, Petitioner's last gasp is to advance a convoluted argument to the effect that it should not be liable for damages sustained by the Plaintiff because he ". . . has suffered no violation of his employment rights . . .". Petitioner's brief at 13. The argument is pure sophistry. In *Vaca v. Sipes, supra,* this Court succinctly set forth the law on damages in cases, such as the present one, in which both an employer and union have been sued:

> The governing principle, then, is to apportion liability between the employer and the union *according to the damage caused by the fault of each.* (386 U.S. at 197).

Here, as a direct result of the union breach of its duty to represent him, Plaintiff had to hire a private attorney for the System Board hearings. As a result of having to hire a private attorney, Plaintiff incurred substantial

legal fees. Plaintiff's indebtedness for the attorney's fees, therefore, was a direct and proximate result of the breach by the union. Pursuant to the above-quoted portion of *Vaca v. Sipes, supra,* ALPA was only held liable for the damage caused by its wrongful conduct.

What Petitioner has done in this case is to take an innocuous opinion by the Fifth Circuit and, through legal gymnastics and simple sophistry, attempt to persuade this Honorable Court that the court below created some abominable new rule of law that will wreak havoc with the Railway Labor Act and Labor Management Relations Act and, in general, turn the body of labor law on its head. Nothing could be further from the truth.

The Fifth Circuit merely affirmed the rule that a union cannot discriminate against employees within its bargaining unit based upon that person's status as a non-member of the union. In so doing the court applied the well-settled dictates of *Vaca v. Sipes, supra,* and its progeny.

Respondent respectfully submits that this case does not even approach the circumstances set forth in Rule 17 for the discretionary exercise of this Court's jurisdiction.

CONCLUSION

The Petition borders on the frivolous. For reasons set forth above, it should be denied.

Respectfully submitted,

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Telephone: (305) 377-0241
By GARY D. FOX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing were mailed this 4th day of May, 1981 to: Gary Green, Esquire, Air Line Pilots Association, Int'l, 1625 Massachusetts Avenue, N.W., Washington, D.C. 20036; Carmen Leon & William Bell, Esqs., Eastern Air Lines, Inc., Miami International Airport, Miami, Florida 33148; and Daniel B. Edelman, Yablonski, Both & Edelman, 1140 Connecticut Ave., N.W., Washington, D.C. 20036.

Printed briefs of this Respondent's Brief in Opposition were mailed this 21st day of May, 1981.

By GARY D. FOX

Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

J. E. PALAEZ DEL CASAL and EASTERN AIR LINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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The Court of Appeals in this case held that whenever a union supplies counsel in grievance proceedings to members and to non-member agency fee payors, the duty of fair representation requires it to provide the same service to non-members who make no contribution to the cost of the service. The Court of Appeals upheld an award of damages against ALPA for breach of its duty of fair representation even though: (1) ALPA carried out Respondent's request that it place his grievance in arbitration before a Systems Board of Adjustment; (2) Respondent was fully represented before the Systems Board through counsel retained by him; (3) the Systems Board held that Respondent was discharged for incompetence as a pilot consistent with the collective bargaining agreement; and (4) the Court of Appeals as well as the District Court upheld the arbitration result as final and binding and concluded that ALPA's refusal to provide Respondent with staff counsel had not prejudiced

Respondent in arbitration nor undermined the integrity of the arbitration proceeding.[1]

In its recent decision in *United Parcel Service* v. *Mitchell*, 49 U.S.L.W. 4378 (April 20, 1981), decided shortly after the filing of the Petition herein, this Court stated as follows:

> "It is not enough, . . . , for an employee . . . to prove that he was discharged in violation of the collective-bargaining agreement. '*To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union . . . .*'" *United Parcel Service* v. *Mitchell*, 49 U.S.L.W. at 4379, quoting *Hines* v. *Anchor Motor Freight*, 424 U.S. 545, 570-71 (1976) (emphasis added).

In *United Parcel Service*, the Court held that untimeliness of an individual's suit seeking to set aside an arbitration decision upholding his discharge required dismissal not only of his breach of contract claim against his employer, but also of his DFR claim against the Union. Since the untimeliness of the individual's suit precluded any showing by him that his discharge was contrary to the contract, the DFR claim was ordered dismissed along with the breach of contract claim. Here, Respondent fails to show his discharge was contrary to the contract, not because of any untimeliness of his judicial attack on the arbitration, but because the integrity of the arbitration has been judicially upheld. It nevertheless follows, here every bit as much as in *United Parcel Service*, that an employee who fails to show that his "discharge was

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[1] The intimations in the Brief in Opposition (pp. 4-5, n. 2) that Respondent was somehow prejudiced by being represented by his own retained counsel and that the Systems Board was not impartial are foreclosed by the Court of Appeals' decisions (Petition, 7a-8a).

contrary to the contract" cannot "prevail against either the company *or the Union* . . . ." *Id.*[2]

The thrust of the Brief in Opposition is its dispute with our characterization of the Court of Appeals' decision as creating a *per se* rule that unions which furnish staff counsel to dues-paying members and agency fee payors must provide the same service to non-members, such as Respondent, who make no contribution to its cost (Brief in Opposition, p. 7). Notably, Respondent concedes that ". . . such a ruling would indeed be a novel one", presumably justifying this Court's discretionary review. We submit that our characterization of the Court of Appeals' holding was correct. While the Fifth Circuit paid lip-service to decisions allowing unions to distinguish between members and non-members with respect to the conferral of internal benefits and to decide under what conditions an attorney will be supplied to a grievant, it plainly concluded that *any time a union supplies counsel to members it must provide the same service to non-members.* That the decision constitutes a *per se* rule is confirmed by the fact that the Court of Appeals held ALPA liable for a DFR breach despite its conclusion that Respondent's discharge was in compliance with the applicable collective bargaining agreement and that his employment status had in no way been harmed by ALPA's conduct.

Absent union conduct in some way thwarting a *meritorious* grievance or otherwise harming employment

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[2] Notably, Justice Stevens disagreed with dismissal of the plaintiff's DFR claim in *United Parcel Service.* Speaking for himself only, he asserted as follows: "The fact that the underlying discharge may not have violated the collective-bargaining agreement does not necessarily absolve the Union of liability for its breach, ..." 49 U.S.L.W. at 4382, n. 4. The Court's disposition of the plaintiff's DFR claim as against the Union necessarily rejects the view stated by Justice Stevens. It also necessarily requires reversal of the Court of Appeals' decision which assigned liability for breach of DFR despite upholding the arbitration decision which sustained Respondent's discharge as consistent with the collective bargaining agreement.

status, no harm cognizable nor remediable by the DFR can be found to occur. Respondent's reliance upon the "apportionment rule" of *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967) is misplaced. While liability surely is to be apportioned between the employer and the unions "according to the damage caused by the fault of each", *id.*, this hardly establishes a basis for damage recovery where union conduct has in no way harmed the plaintiff's employment status. As declared by this Court in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 568 (1976), where the union places the employee's grievance in arbitration, ". . . the focus is . . . on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union's breach of duty contributed to the erroneous outcome of the contractual proceedings." A plaintiff, such as Respondent, who fails to show that his discharge was contrary to the contract" may not prevail "against either the company *or the Union*". *Hines, supra*; *United Parcel Service, supra* (emphasis added).

CONCLUSION

For the reasons stated herein and in the Petition, the Petition for Writ of Certiorari should be granted; the decision of the Court of Appeals should be reversed.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

This supplemental brief is filed pursuant to Rule 22.6 in light of the Brief for the United States as *Amicus Curiae.*

INTRODUCTION

Following his discharge from employment as an airline pilot, Plaintiff Del Casal initiated a grievance against his employer, Eastern Airlines. ALPA took all steps necessary to assure Plaintiff a System Board arbitration hearing, but advised him that due to its policy limiting staff counsel to dues and agency fee payors, it could not provide him staff counsel at the System Board. Plaintiff accordingly retained counsel who represented him before the System Board which sustained his discharge. Plaintiff sued to vacate the Board decision, alleging that his discharge violated the collective bargaining agreement

and that refusal of staff counsel was a breach of ALPA's duty of fair representation which vitiated the finality of the arbitration decision. The courts below, though upholding the arbitral rejection of Plaintiff's grievance and rejecting Plaintiff's assertion that refusal of staff counsel prejudiced the arbitration result, held that ALPA's refusal of staff counsel was a breach of DFR and that Plaintiff was entitled—despite the lack of harm to his employment rights—to recover as damages the counsel fees incurred to his retained counsel.

ARGUMENT

1. *The Government's argument in support of Plaintiff's damage recovery flies in the face of Vaca v. Sipes, 386 U.S. 171, 197 (1967), and its progeny which hold that to recover damages against either the employer or the union an employee must establish not only a breach of DFR but also breach of the collective bargaining agreement.*[1] The Government's argument is based pri-

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[1] *Hines* v. *Anchor Motor Freight*, 424 U.S. 545, 570-71 (1976); *United Parcel Service* v. *Mitchell*, 101 S.Ct. 1559, 1563 (1981); *Clayton* v. *Automobile Workers*, 101 S.Ct. 2088 (1981). Most recently the Court in *Clayton* stated:

> ". . . . As we stated in *Vaca* v. *Sipes*, *supra*, 386 U.S., at 197-198, an employee who establishes that the union breached its duty of fair representation in processing his grievance, *and that the employer breached the collective-bargaining agreement*, may be entitled to an award of damages
>
> > 'apportion[ed] . . . between the employer and the union according to damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.'" *Clayton*, 101 S.Ct. at 2096, n. 15 (emphasis added).

See *Deboles* v. *Trans World Airlines*, 552 F.2d 1005, 1018 (C.A. 3, 1977), *cert. denied*, 434 U.S. 837; *Wyatt* v. *Interstate & Ocean Transp. Co.*, 623 F.2d 888, 892 (C.A. 4, 1980); *St. Clair* v. *Local*

marily on *Czosek* v. *O'Mara*, 397 U.S. 25, 28-29 (1970), which, it says, established "that a fair representation suit has an existence separate from an action against an employer for wrongful discharge" (Govt. Br. 8). The Government misunderstands this "separate . . . existence." While *Czosek* allows employees to proceed separately against the union, it no more suggests the union could be held liable for damages absent violation of the employees' rights under the collective bargaining agreement than that an employer who prevailed in arbitration could be held liable for damages absent a DFR breach undercutting arbitral finality. *Czosek* explained that an apportioned share of damages may be imposed upon a union which violates the DFR, assuming "a wrongful discharge by the employer", 397 U.S. at 29, and is no precedent for the imposition of any damages when the employee's discharge, after a fair hearing, is upheld. Indeed, the Fourth Circuit recently cited *Czosek* as authority to the contrary, *Wyatt*, *supra*, 623 F.2d at 892.

The Government's reliance on *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) is similarly misplaced. While we agree that the "right to bring fair representation suits is implied by the Railway Labor Act" (Govt. Br. 8), nothing in *Foust* suggests deviation from the rule of *Vaca*. Rather, *Foust* emphasized that: "The fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights." 442 U.S. at 48-49. The "compensation principle" *id.* of *Foust* thus precludes any damage recovery to a plaintiff like Del Casal whose employment rights have not been violated. *Truck Drivers, Oil Drivers, Etc.*,

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Union No. 515, Teamsters, 422 F.2d 128, 132 (C.A. 6, 1969); *Cronin* v. *Sears, Roebuck & Co.*, 588 F.2d 616, 619 (C.A. 8, 1978); *Buchholtz* v. *Swift & Co.*, 609 F.2d 317 (C.A. 8, 1979), *reh. den.* —— F.2d ——, 102 LRRM 2219, 2226, *cert. denied*, 444 U.S. 1018.

Local 705 (*Aaron Kesner*), 209 N.L.R.B. 292, enforced, 532 F.2d 1169 (C.A 7, 1976), *cert. denied*, 429 U.S. 1022, on which the Government also relies (Govt. Br. 8), is thoroughly consistent with our understanding of *Vaca*. In *Kesner*, the Board, though finding that the union's misconduct during arbitration was a breach of DFR, refused to grant an affirmative, monetary remedy against the union. It refused precisely because it determined that Kesner's underlying grievance—as here—was without merit, see *Kesner* v. *National Labor Relations Board*, 532 F.2d 1169, 1175 (C.A. 7, 1976). Plainly, *Kesner* supports our view that absent an underlying, meritorious grievance against the employer, a DFR complainant may not consistent with *Vaca* and its progeny recover damages.[2]

Neither the Government nor Del Casal cites a single case allowing damage recovery for breach of DFR to a plaintiff who fails to show a violation of employment

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[2] The Government (p. 8, n. 4) attacks the reading of *United Parcel Service* v. *Mitchell*, 101 S.Ct. 1559 (1981) presented in our Reply Brief (2-3), but in doing so mistakenly takes the views stated in Justice Stevens' separate opinion as authoritative.

The Court's disposition in *United Parcel Service*, contrary to the Government, was a declaration that the district court had been correct in granting summary judgment—which had been entered on behalf of the union as well as of the employer—and an unqualified reversal of the Second Circuit's judgment to the contrary, 101 S.Ct. at 1565. Contrary to Justice Stevens' separate views, 101 S.Ct. at 1569, n. 4, the Court's decision confirms that an employee seeking to recover damages against the employer or the union—either jointly or separately, *Czosek*, *supra*—must show *both* a breach of contract by the employer and a breach of DFR by the union:

> ". . . *'To prevail against either the company or the Union, [the plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union . . . .'*" *United Parcel Service* v. *Mitchell*, 101 S.Ct. at 1563, quoting *Hines* v. *Anchor Motor Freight*, 424 U.S. 545, 570-71 (1976) (emphasis added).

rights under the collective bargaining agreement. Their failure to do so is perhaps the strongest indication that the Court of Appeals erred in allowing such a recovery here.

2. *Application of ALPA's policy limiting staff counsel to grievants who are dues or agency fee payors does not violate DFR under the Railway Labor Act in any event.* The Government stresses that DFR applies equally to *administration* and *negotiation* of the labor agreement (Govt. Br. 3-5)—again, we fully agree—but ignores that the consistent focus of this Court's DFR decisions has been to guard against harm to employment rights which could occur should a union "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 190-91 (Petition, 5 *et seq.*) No decision of this Court has ever held DFR breached under either the Railway Labor Act or the National Labor Relations Act where a union having taken all steps necessary to assure an aggrieved employee's access to the arbitration forum supply refuses to provide him with an advocate. As we have shown, union refusals to provide counsel have been upheld in every context where they have previously been challenged (Petition, 10-11).

The only cases in the Government's Brief even close on their facts to this one are two decisions of the National Labor Relations Board, *Hughes Tool Co.*, 104 N.L.R.B. 318, 325-26 (1953) and *International Assn. of Machinists, Local 679 (Canfield Rubber Co.)*, 223 N.L.R.B. 832, 835-36 (1976), which the Government cites for the proposition that "a union cannot charge a non-member a fee to cover the expense of processing his grievance if it provides the same services to members without charge." (Govt. Br. 5-6).[3] The unions in those cases, however,

[3] *Kesner*, *supra*, also cited by the Government, demonstrates that where, as here, the employee's underlying grievance is without merit, the NLRB—consistent with *Vaca*—would not order monetary relief against the union for a breach of DFR.

had not only refused to provide service of a union representative in connection with non-members' grievances, but had also denied access to contractually-established arbitration forums as well. The cited NLRB decisions are thus not applicable to this case in which ALPA took steps necessary to assure Plaintiff a full and fair arbitration hearing, which he in fact received, though represented by his own, rather than union staff, counsel.

3. *The Government's Brief does not speak authoritatively with respect to the Railway Labor Act.* We submit that the Government's brief fails to explore differences between the Railway Labor Act and the National Labor Relations Act strongly suggested by this Court's previous decisions. Most notably, as the Court recognized in *Vaca, supra*, 386 U.S. at 174, n. 3, NLRA does not guarantee individual employees the right to invoke arbitration where, as is typically the case, access to arbitration is placed by contract in the union's control. If, as the Court stated in *Foust, supra*, 442 U.S. at 49, n. 11, §§ 3 First (i) (j) of RLA, 45 U.S.C. 153 (i) (j), allow individuals to proceed to a System Board independently of the union, then the concerns voiced by the NLRB in *Hughes Tool* and *Canfield Rubber*, where access to arbitration is controlled by the union, would not apply.

The Government's lack of credentials to speak regarding RLA is further demonstrated by its blatantly incorrect assertion that if ALPA's contract with Eastern had contained a union security provision requiring payment of dues or agency fees as a condition of continued employment, such a provision would violate the Florida Constitution (Govt. Br. 7, n. 3). For this proposition, the Government cites *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 750 (1963), an NLRA case. Incredible as it may seem, the Government is apparently unaware that

RLA specifically sanctions union security provisions and contains no provision parallel to § 14(a) of NLRA, 29 U.S.C. 164(a), subjecting such provisions to state law. As such, the RLA policy of discouraging "free riders" is markedly stronger than that evidenced by NLRA.[4]

We submit that ALPA's policy of limiting the expensive service of staff counsel to dues and agency fee payors is a reasonable rule consistent with the broad discretion heretofore reserved to unions in the performance of their statutory responsibilities, consonant with the strong Railway Labor Act policy of discouraging "free riders", and wholly consistent with ALPA's duty of fair representation. The Court of Appeals' *per se* rule that such policies necessarily violate the Railway Labor Act, we submit, finds no support in decisions of this Court or other courts of appeals, or even in decisions of the NLRB applying the NLRA. Finally, the Court of Appeals' upholding of a damage recovery absent any underlying violation of Del Casal's employment rights is contrary to the rule established in *Vaca* and *Hines*, and contrary to the compensation principle articulated by this Court in *Foust*.

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[4] The Government though invited to present its views in this RLA case has responded, as to the content of DFR, with NLRA cases not even directly involving the DFR. *Hughes Tool Co.* was a proceeding on petition to revoke certification and *Canfield Rubber Co.* applied § 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), neither of which has a specific analog in RLA.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted; the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a union breaches its duty of fair representation when it refuses to provide an attorney to represent a member of the bargaining unit in a discharge proceeding solely because the employee is not a member of the union.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to state the views of the United States.

STATEMENT

1. Respondent J.E. Pelaez Del Casal was employed by respondent Eastern Airlines as a pilot. While so employed, Del Casal twice attempted to become a member of petitioner Air Line Pilots Association, but was denied membership because petitioner's members questioned his competence as a pilot. In May 1975, Eastern discharged Del Casal on the ground that he was an unsafe and incompetent pilot (Pet. App. 2a).

Following his discharge, Del Casal filed a grievance pursuant to the collective bargaining agreement then in force between petitioner and Eastern, which allowed him to submit his discharge for review by Eastern officials. In this first

level grievance procedure, one of petitioner's staff attorneys, John Loomos, represented Del Casal (Pet. App. 2a). When the grievance was rejected at this stage, Del Casal requested that petitioner submit his case to the Eastern Airlines Pilots System Board of Adjustment. This arbitration panel was established under the collective bargaining agreement, as required by the Railway Labor Act (45 U.S.C. 184), to settle disputes between Eastern and its pilots. Petitioner did submit the case, but, prior to Del Casal's hearing, instructed Loomos to cease representing Del Casal because Del Casal was not a union member. Loomos informed Del Casal of his withdrawal, and advised the pilot to hire an attorney, which he did (Pet. App. 2a-3a).

Del Casal was represented by his retained counsel throughout the System Board proceedings, which encompassed several days of hearings over the course of a year. The System Board ultimately ruled in February 1977 that Eastern was justified in discharging Del Casal. Del Casal then brought this action in the United States District Court for the Southern District of Florida, seeking to have the System Board decision set aside and alleging that petitioner had breached its duty of fair representation by refusing to provide an attorney to represent him before the Board (Pet. App. 4a).

2. The district court refused to set aside the Board decision sustaining the discharge, but agreed that petitioner had breached its duty of fair representation (Pet. Supp. App. 1a-11a; 465 F. Supp. 1254 (1979)). The court found that Del Casal was entitled to damages in the amount of the attorney's fees paid to his retained counsel and other incidental expenses. A jury trial to determine damages resulted in a verdict of $35,000. The court entered judgment in that amount (Pet. Supp. App. 14a), and both petitioner and Del Casal appealed.

On appeal, the Fifth Circuit affirmed the decision regarding Del Casal's discharge as well as the finding of a breach of the duty of fair representation (Pet. App. 1a-13a; 634 F. 2d 295 (1981)). The court of appeals recognized that this duty does not require a union to accept a prospective member, extend internal union benefits to non-members, or process all grievances, regardless of merit (Pet. App. 9a). However, the court held that petitioner had arbitrarily exercised its authority to represent employees within the bargaining unit by discriminating against Del Casal on account of his non-union status. It concluded: "While ALPA has the authority to decide under what conditions an attorney will be supplied to a grievant, the fact that the grievant is not a member of the union can play no part in that decision" (*id.* at 11a).

Petitioner seeks review in this Court of the finding that it breached its duty of fair representation.

DISCUSSION

This case does not present any issue warranting further review. The decision of the court of appeals is correct and is consistent with decisions of this Court, of other courts of appeals, and of the National Labor Relations Board in analogous cases.

1. Petitioner here argues that its duty was only to permit Del Casal's case to be raised before the System Board. Petitioner denies that it had any duty to ensure that Del Casal's protest of his dismissal was adequately presented to that board, even though the union provided attorneys in such instances for its own members, and offered Del Casal no adequate alternative representation. The decisions of this Court establish that the duty of fair representation cannot be so narrowly construed.

In *Electrical Workers* v. *Foust*, 442 U.S. 42, 46-48 (1979), the Court explained the development of the duty of

fair representation under the Railway Labor Act.[1] The duty was first recognized in *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944), where the Court held that when Congress empowered labor unions to bargain exclusively on behalf of all members in a bargaining unit, it imposed a correlative duty to exercise the power fairly. "The fair representation doctrine thus serves as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *Vaca* v. *Sipes*, [386 U.S. 171, 182 (1967)]." *Electrical Workers* v. *Foust, supra*, 442 U.S. at 46-47. The Court noted that this duty extends beyond negotiation to both administration and enforcement of collective bargaining agreements (*id.* at 47). It concluded: "In particular, a union breaches its duty when its conduct is 'arbitrary, discriminatory, or in bad faith,' as, for example, when it 'arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion.' *Vaca* v. *Sipes, supra*, at 190, 191" (*ibid.*).

Even before its decision in *Foust*, this Court had made clear in a variety of contexts that a union's duties include adequately representing a member of the bargaining unit in grievance or discharge proceedings.[2] This obligation is thus

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[1]Except for 45 U.S.C. 153, the provisions of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, are applicable to air carriers (45 U.S.C. 181).

[2]In *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957), this Court held that "[t]he bargaining representative can no more unfairly discriminate in [protecting employee rights secured by the collective bargaining agreement] than it can in negotiating a collective agreement" (footnote omitted). The National Labor Relations Act (29 U.S.C. 151 *et seq.*) creates an analogous duty of fair representation (*Electrical Workers* v. *Foust, supra*, 442 U.S. at 46-47 n.8). Under that Act, the Court has held that the duty includes administration as well as negotiation of a contract. See, *e.g.*, *Humphrey* v. *Moore*, 375 U.S. 335, 342-343 (1964) (duty of fair representation would be breached if union deceived members about their rights and prevented a fair hearing before joint union/employer grievance committee); *Hines* v. *Anchor Motor Freight,*

an integral part of the federal labor policy that requires the employee to utilize the grievance machinery provided in the collective bargaining agreement before seeking judicial relief. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976).

Allowing Del Casal to appear before the System Board without providing representation solely because he was not a union member constituted precisely the sort of arbitrary denial of adequate protection forbidden by this Court's decisions. The refusal to provide a lawyer had nothing to do with the merits of the pilot's grievance, and the union cannot now claim that it denied representation on this ground. For the same reason, the judicial affirmance of the Board's decision sustaining his discharge does not retroactively relieve the union of its duty to provide adequate representation.

Petitioner's attempt to justify its refusal to provide adequate representation on the ground that Del Casal had not contributed to the cost of providing that representation is equally without merit. The very "free rider" argument made by petitioner here (Pet. 11-12) has been rejected by the National Labor Relations Board, in holding that a union cannot charge a non-member a fee to cover the expenses of processing his grievance if it provides the same service to

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Inc., 424 U.S. 554, 562-567 (1976) (finality provisions of the contract do not apply if the quality of representation by the union at discharge proceedings seriously undermines the integrity of the arbitral process). The decision below also comports with rulings by other courts of appeals. In *Miller* v. *Gateway Transportation Co.*, 616 F. 2d 272, 277 (7th Cir. 1980), the court found that providing a representative to read an employee's grievance to a grievance panel would not satisfy the union's obligation to the employee. In *Smith* v. *Hussmann Refrigerator Co.*, 619 F. 2d 1229 (8th Cir.), cert. denied, 449 U.S. 839 (1980), the court found that a union breached its duty when it left to the employer the task of representing certain employees within the bargaining unit during grievance proceedings.

members without charge. *Hughes Tool Co.*, 104 N.L.R.B. 318, 325-326 (1953); *International Association of Machinists, Local 679 (Canfield Rubber Co.)*, 223 N.L.R.B. 832, 835-836 (1976). The union's action here in refusing to provide representation, and forcing Del Casal to arrange and pay for his own representation solely because he was not a union member, would *a fortiori* violate NLRB precedent.

Petitioner claims that there is a conflict among the courts of appeals because other courts have held that a union need not provide counsel for an arbitration proceeding (Pet. 10-11). The cases upon which petitioner relies do not support this claim. *Golden* v. *Local 55, Association of Firefighters*, 633 F. 2d 817, 821-822 (9th Cir. 1980), stands for the proposition that a union may provide an attorney for some, but not all, of its members, so long as the choice is made on a reasonable basis, and not on racial grounds. The court below also recognized the union's right to make rational decisions about when it would provide an attorney, but held that union membership, like race, is an impermissible basis for decision (Pet. App. 11a). In *D'Elia* v. *New York, N.H. & H. R.R.*, 230 F. Supp. 912, 916 (D. Conn.), aff'd, 338 F. 2d 701 (2d Cir. 1964), cert. denied, 380 U.S. 978 (1965), the court rejected a claim that because the union had failed to provide its member with an attorney, the National Railroad Adjustment Board had violated the member's constitutional rights by hearing the grievance. Finally, in *Grovner* v. *Georgia-Pacific Corp.*, 625 F. 2d 1289, 1291 (5th Cir. 1980), the court held that the union's duty to provide adequate representation at an arbitration hearing was satisfied by providing a union representative, rather than an attorney. None of these cases suggests that any other court of appeals would conclude that petitioner properly refused to provide counsel to Del Casal solely because he was not a union member.

Petitioner's reliance on cases in which unions were not required to provide other specific benefits (Pet. 9-10) is similarly unpersuasive. Unlike those cases, this one involves the processing of grievances, an area that this Court has found to be comprehended within the duty of fair representation. Contract administration is no less important than contract bargaining, and the courts below therefore reasonably concluded that refusing to provide a pilot with a lawyer in a grievance proceeding solely because of his non-union status differs significantly from denying him internal benefits such as insurance. Contrary to petitioner's implication (Pet. 11), there is nothing in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), to the contrary. In contrast to the "agency shop" agreement discussed in that case, petitioner's contract with Eastern contained no union security provision requiring Del Casal to pay dues or fees as a condition of continued employment.[3] Moreover, as noted *supra*, page 1, Del Casal had sought to become a union member and thus to assume the financial obligations of membership, but the union had denied him membership.

2. Petitioner also claims (Pet. 5-9) that the courts below erred because there was no showing that its failure to provide an attorney resulted in Del Casal's loss of employment. Contrary to petitioner's contention, this Court's holdings do not make such a showing a prerequisite to finding a breach of a union's duty of fair representation.

Nor is there merit in petitioner's contention (Reply Br. 2) that this Court's recent decision in *United Parcel Service, Inc.* v. *Mitchell*, No. 80-169 (Apr. 20, 1981), supports its

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[3]Such a provision would violate the Florida Constitution (Fla. Const. art. I § 6). See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 750 (1963).

position.[4] Nothing in that decision casts doubt on the continuing validity of *Czosek* v. *O'Mara*, 397 U.S. 25, 28-29 (1970), in which this Court established that a fair representation suit has an existence separate from an action against an employer for wrongful discharge, or *Electrical Workers* v. *Foust, supra*, 442 U.S. at 47, in which the Court further recognized that the right to bring fair representation suits is implied by the Railway Labor Act. Similarly, the National Labor Relations Board has held that a union breaches its duty of fair representation when it inadequately presents an employee's grievance, even if the grievance itself is properly rejected. *Truck Drivers, Oil Drivers, etc., Local 705 (Aaron Kesner)*, 209 N.L.R.B. 292, enforced, 532 F. 2d 1169 (7th Cir. 1974), cert. denied, 429 U.S. 1022 (1976). The decision

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[4]Petitioner suggests that the Court in *United Parcel Service* held that the employee's claim against the union for abrogation of its duty of fair representation must be dismissed because of the untimeliness of the suit against his employer challenging his discharge (Reply Br. 2). But, as Justice Stevens emphasized, the employer was the only petitioner in *United Parcel*, and it expressly disavowed any position on the status of the employee's claim against the union. Slip op. 1-2 & n.1 (Opinion of Stevens, J.). As Justice Stevens further noted (*id.* at 3-4 n.4), the two claims are distinct:

> [T]he determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty, but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all. For example, if, solely for reasons of racial bias, a union processes a discharged employee's grievance in bad faith, the union breaches its duty of fair representation. Cf. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192. The fact that the underlying discharge may not have violated the collective-bargaining agreement does not necessarily absolve the union of liability for its breach, although it may limit the size of the employee's recovery against the union.

Petitioner incorrectly asserts (Reply Br. 3 n.2) that the Court's "disposition of the plaintiff's [fair representation] claim" against the union was inconsistent with Justice Stevens' analysis. But there was no such "disposition" because that claim was not before the Court.

below is thus consistent with the national labor policy and effectuates the purposes of the Railway Labor Act by requiring a union to process grievances adequately or to reject them on their merits, not on the employee's membership status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

DOJ-1981-09